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No. ~~21774~~

United States
COURT OF APPEALS
for the Ninth Circuit

DELBERT G. CLOSTERMANN,
Executor of the Estate of
Charles W. Feist, deceased,

Appellant,

v.

THE GATES RUBBER COMPANY,
Colorado corporation,

Appellee.

APPELLANT'S BRIEF

*Appeal from the United States District Court
for the District of Oregon*

HONORABLE GUS J. SOLOMON, Judge

FILED

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JURISDICTIONAL STATEMENT

The jurisdiction of the District Court was based upon diversity of citizenship and 28 U.S.C. Sec. 1332. The complaint alleges a controversy exceeding \$10,000 (R. 1) between plaintiff, a citizen of Oregon and defendant, a Colorado corporation having its principal place of business in the State of Colorado and authorized to do business in Oregon.

The answer (R. 12) admits that defendant is a Colorado corporation.

The jurisdiction of this court to review said judgment is based on 28 U.S.C. 1261 pursuant to Notice of Appeal timely filed (R. 61), after Plaintiff's Motion to Set Aside Judgment, or to Amend Judgment or in the Alternative for a New Trial was denied (R. 52).

INTRODUCTION

Plaintiff seeks damages resulting from his receiving permanently disabling injuries sustained on February 2, 1965 while employed by a non-complying employer under the Oregon Workmen's Compensation Act in a non-hazardous industry.

Evidence revealed that Defendant Gates is a multi-million dollar closely held Colorado manufacturing corporation of tires and allied rubber products and maintained a warehouse in Portland where plaintiff was employed as a warehouseman.

Gates also owned a separate Colorado corporation, Columbine Stores which was engaged in a hazardous activity in Oregon conducting its business through Buds Tire Exchange in Medford. Columbine, as such, had elected to be subject to the Oregon Workmen's Compensation Act.

In excess of ninety days after plaintiff sustained his injuries, plaintiff's supervisor, being Gates agent, presented plaintiff a claim prepared for his receiving

benefits under the Oregon Workmen's Compensation Act. Plaintiff signed this claim at the request of his supervisor.

Defendant filed this claim with SIAC after the statutory limitation for the filing of a claim had expired. SIAC paid a minimum award.

Defendant presented evidence purporting to show that Columbine was liquidated into Gates two days prior to Plaintiff's injury; and on that basis, then, Gates was engaged in a hazardous industry.

Evidence also revealed that defendant Gates had failed to comply with the statute in that it failed to give the required statutory notice to SIAC that it was engaged in a hazardous activity until May 24th, 1965.

Therefore plaintiff is entitled to a statutory remedy against a non-complying or defaulting employer which includes the receiving of the nominal SIAC award from SIAC in addition to his common law remedy against the non-complying employer. SIAC possesses a statutory lien on any award that plaintiff receives from the non-complying employer.

The issue was segregated on the question of whether by accepting the award from SIAC plaintiff was precluded from seeking his common law remedy.

The court's opinion clearly recognized that there were exceptions to a plaintiff being precluded from exercising his common law remedy on accepting an award from SIAC; but failed to apply the statutory

exception granting plaintiff the right to accept the award and also exercise his common law remedy.

The court's recognition of the Columbine liquidation into Gates gives rise to the statutory exception because of Gates failure to comply with the filing of the statutory prerequisite notice to SIAC until after the injury.

Hence by statutory recognition the SIAC award to plaintiff does not preclude his common law remedy. Plaintiff at no time paid into the SIAC insurance fund, and neither did defendant Gates as the employer of plaintiff.

Defendant's agent in Oregon, being also plaintiff's supervisor was also the registered Oregon corporate agent for the defendant Gates corporation and the Columbine corporation.

STATEMENT OF THE CASE

The Oregon Workmen's Compensation Act grants an injured employee of a non-complying employer the right to receive an award under the Act in addition to exercising his common law remedy against a negligent employer; and the liquidation of a separate entity complying subsidiary corporation engaged in a hazardous industry into the parent corporation will not shield the parent corporation from an action brought by an injured employee of the parent corporation under the "wholly wholly clause of the Workmen's Compensation Act," there being no statutory

compliance by the parent corporation with the State Industrial Accident Commission until after the occurrence of the injury and limitation of time had expired; hence a claim filed and award made by State Industrial Accident Commission to an injured employee of a non-complying corporation will not preclude a separate statutory action against the parent corporation and the parent corporate employer is not entitled to the protections of the Oregon Workman's Compensation Act.

STATEMENT OF THE FACTS

Plaintiff, a ten year employee of Gates, sustained disabling injuries to his back while employed in their Portland warehouse on February 2, 1965.

Gates had previously rejected the provisions of the Oregon Workman's Compensation Act (SIAC) and they were operating a non-hazardous business. Plaintiff participated in a private insurance plan (hospitalization) through payroll deductions.

While this appeal was pending, plaintiff died as a result of the injuries suffered herein and his executor was substituted as appellant.

Plaintiff's testimony was that his family consisted of a wife and four kids (Tr. 39) that on May 20th, 1965 while he was at home following hospitalization and under medication Mr. Elliott the manager of the Portland warehouse brought him an insurance form (Def. Ex. 9) (see also SIAC folder No. 2, Ex. 77, 18,

80 which reveals that defendant filed 3 claim forms on varying dates while plaintiff only signed one claim form.)

That he never paid any contributions to SIAC and kept working until April 20th, 1965 and kept his employer advised of his physical condition (Tr. 41) and that he was told he was under Employers Mutual Insurance (Tr. 42) and he never heard of Columbine Stores; that Bud's Tire Exchange of Medford was a tire agent of Gates; that he had back cancer and was not getting Workman's Compensation and that he was on welfare (Tr. 42).

Mr. Roberts, of counsel for defendant, judicially admitted to the Court (Tr. 3) that Bud's Tire Exchange was subject to the provisions of the Act, and that Columbine, owning Bud's Tire Exchange, was a wholly owned subsidiary of Gates (Tr. 4); that Gates was not under the Act; that Gates liquidated into itself, Columbine on January 31, 1965 (Tr. 4) and in March (Tr. 5) SIAC was notified on a payroll report by the Gates payroll girl (Pl. Ex. 21) and the Feist claim was signed on May 20th, 1965 (Tr. 5) and that the claim was paid on August 5th, 1965.

And by Gates taking over Columbine effective January 31, 1965 the Portland warehouse came under the "Wholly-Wholly" clause (Tr. 6).

Mr. Clostermann, attorney for plaintiff, judicially admitted (Tr. 9) that Feist was an employee of Gates which rejected the Act, that Feist was injured on February 2, 1965, that Gates sent him to a Chiroprac-

tor and he then later went to a medical doctor. He was hospitalized April 21, 1965 and he signed some papers along with the SIAC claim (Def. Ex. 9) on May 21, 1965 and that Feist thought the SIAC form was another type of insurance claim (Tr. 10) and Columbine filed a "Withdrawal Certificate" with Oregon Corporation department dated April 21, 1965 (Pl. Ex. 18) after the accident (Tr. 11) and there was no evidence that either Columbine or Gates complied with the statutory requirements regarding a surviving corporation filing documents of merged, dissolved or liquidated corporations.

Mr. Cooley (Tr. 17) of SIAC testified for defendant that he had the SIAC records (being SIAC files No. 1, 2 and 3 in evidence) and that the Feist petition for rehearing was denied (Tr. 17) and that the Feist claim form (Def. Ex. 9) was not signed by the employer and filed until June 18th, 1965, being a month and a half after Feist signed the form (Tr. 19), that Mr. Matthis was the superior in the Policy Holders Division (SIAC) who wrote a letter regarding coverage (Pl. Ex. 27) (Tr. 20).

Mr. Ewert of SIAC testified for defendant (Tr. 21 et seq) that there was a filing by Columbine Stores January 5, 1962, that there was no reference that Columbine was owned by Gates (Tr. 24) and that he received some information from Mr. Nicolay or Mr. Nettleton (Gates corporate officers in Denver) about April 12, 1965 and that the first notice to SIAC was a payroll report dated March 17th, 1965 (Tr. 26).

Mr. Clostermann stated that Gates had not filed "a doing business as certificate" until May 17th, 1965 (Tr. 29, Pl. Ex. 30).

Plaintiff is setting forth a partial list of exhibits and requests the court read Plaintiff's First Supplemental Memorandum of Law (R. 84) and Plaintiff's Memorandum of Law (R. 63) in which plaintiff has delineated the facts, evidence, exhibits as applied to the law in detail; in addition to Plaintiff's Memorandum in Support of Motion To Set Aside Judgment (R. 52):

<i>Plaintiff Exhibit</i>	<i>Contents</i>
No. 12	Letter Gates to Charles Feist recognition of completing ten years' employment, dated April 30, 1965.
No. 13	Oregon Corporation Department Certificate of Authority as a foreign corporation to Gates, dated August 28, 1963.
No. 17A	Certificate of Authority, Oregon Corporation Department to Columbine Stores dated February 21, 1962.
No. 18 and No. 45, 46, 47, 48, 49.	Certificate of Withdrawal, Oregon Corporation Department to Columbine Stores dated April 26, 1965. This should be examined in the light of Plaintiff's exhibits 45, 46, 47, 48, which show by newspaper advertisements that Bud's Tire Exchange publicly was carrying on business as such until a newspaper announcement was made on March 9 (Pl. Ex. 49), as to a change of name.

SIAC File No. 3, Ex. 40. Employer's statutory notice to SIAC, application for hazardous industry coverage dated May 20, 1965 and filed May 24, 1965.

Def. Ex. 9 and SIAC File No. 2, Ex. 77, 78, 80. Def. Ex. No. 9 is the SIAC claim signed by Feist on May 20, 1965 brought to him by his superior Elliott. SIAC exhibits 78, 80 are similar claims filed by Gates on varying dates.

Plaintiff asserts the application of the following provisions of the **Oregon Workman's Compensation Act** in effect at the time of the injury. The Act was changed by the 1965 Legislature and the Act as changed is not applicable herein.

ORS 656.052 "Employers engaged in hazardous occupations to file statement with commission giving address and description of occupation; effect of failure to do so. . . ."

(4) "No employer shall engage in a hazardous occupation if the statement required by this section has not been filed."

(5) "Any employer who engages in a hazardous occupation as defined in ORS 656.082 to 656.086 is not entitled to the benefits of ORS 656.002 to 656.590."

ORS 656.312 "Election to recover damages when right of action exists against third person or delinquent employer."

"If a workman of an employer

engaged in a hazardous occupation in violation of ORS 656.052, or of an employer in default as provided in ORS 656.560 receives an accidental injury due to the negligence or wrong of a third person entitling him under ORS 656.154 to seek remedy against such third person, such workman, or if death results from the injury, the other beneficiaries shall elect whether to recover damages from such employer or third person."

ORS 656.314 "Payment of compensation notwithstanding existence of cause of action; lien of commission on cause of action for compensation paid."

(1) The workman or his beneficiaries, shall be entitled to be paid the benefits provided by ORS 656.002 to 656.590 in the same manner and to the same extent as if no right of action existed against the employer or third party, until the amount of benefits that the workman or beneficiaries are entitled under ORS 656.002 to 656.590 can be determined and until damages are recovered from such employer or third party."

(2) The commission has a lien against the cause of action in the

amount of compensation paid to the workman or his beneficiaries, including the cost of first aid and other medical, surgical and hospital service which lien shall be preferred to all claims except the cost of recovering damages."

ORS 656.274 "Procedure for obtaining compensation, Time within which application must be filed"

(1) No application shall be valid or claim thereunder enforceable in nonfatal cases unless such claim is filed within three months after the date upon which the accident occurred, but the commission may, in its discretion, upon a sufficient showing being made, permit the filing of a claim in a nonfatal case within one year of the time of the accident."

ORS 656.002 Defines employer as any person who contracts to pay a remuneration for and secures the right to direct and control the services of any person.

ORS 656.582 Provides for the Attorney General of Oregon to defend an employer who is subject to the Act and is a defendant in any personal injury action in the event plaintiff's sole right of recovery is under the act.

Plaintiff asserts the application of the following Oregon Corporation Statutes.

CORPORATION STATUTES

- ORS 57.711 Pertains to the merger of foreign corporations in Oregon in accordance with the laws of the state of incorporation; and if there be a surviving corporation it shall within 30 days after the merger is effective file with the Oregon Corporation Commissioner articles of merger.
- ORS 57.595 Provides for merger and consolidation and sets forth the requirements.
- ORS 57.460 Provides for procedures and requirements of consolidation.

SPECIFICATION OF ERROR

The court erred in denying Plaintiff's Motion to Set Aside Judgment, or to Amend the Judgment, or in the Alternative for a New Trial.

SUMMARY OF ARGUMENT

Argument 1

The injured workman may receive an award from SIAC and maintain an action based on negligence against a non-complying employer.

The Oregon Workmen's Compensation Act grants the injured workman of a non-complying employer in

a hazardous industry, the right to receive an award from SIAC in addition to pursuing his common law remedy against his negligence employer.

The District Court by holding that Columbine was liquidated into Gates, in accordance with defendant's evidence on January 31, 1965 and correctly bottoming its decision on the statute (ORS 656.312) then should have followed the same statutory application which grants the workman the right to pursue his remedy against the non-complying employer. The evidence clearly revealed that Gates did not file their compliance with the statute until May 24th, 1965 (SIAC file No. 3, Ex. 40).

Provisions of the statute providing for SIAC coverage are clear (ORS 656.052) and the penalty for failure to comply with the statute is that the employer is denied the protection of the Act.

Collusion between the Gates officials in Denver and the Gates official in Portland is particularly evident. Elliott of Gates in Portland obtained the signature of Feist on a SIAC claim (Def. Ex. 9) on May 20th, 1965, this while Feist was at home under medication recovering from hospitalization. On the same date in Denver, Gates officials signed Employers Notice to Industrial Accident Commission (SIAC file No. 3, Ex. 40).

Defendant, therefore, is shown to be a non-complying employer by the evidence and may proceed in accordance with the statute (ORS 656.312) as the court indicates in its opinion; and also elect to recover dam-

ages against the non-complying employer. This the plaintiff has precisely done. He may accept the award from SIAC and such acceptance will not prejudice his right to a common law action as the employer failed to comply with the statute (ORS 656.314).

Argument 2

A non-complying employer in a hazardous industry is denied the protection of the Oregon Workmen's Compensation Act.

The Act specifically provides that the filing of the statutory notice is the prerequisite to coverage by the employer (ORS 656.052). The evidence clearly reveals that plaintiff was not an employee of Columbine (Tr. 41), he had never made contributions to SIAC (Tr. 42) and plaintiff was told he was covered by Employers Mutual, that he never heard of Columbine and that Bud's Tire Exchange was a tire agent for Gates in Medford. Yet by corporate maneuvering, defendant Gates evidence reveals that Columbine was absorbed by Gates two days prior to the injury. However, the statutory notice by Gates to SIAC could not be back-dated to reflect statutory compliance so as to be granted full compliance under the Act and preclude plaintiff from his common law remedy.

This result is not in conflict with *Bandy v. Norris, Beggs and Simpson*, 222 Or. 1, 342 P.2d 839 or *Kowcum v. Bybee*, 182 Or. 271, 296 (1947).

The rule of law in the *Bandy* decision is based on the premise that in an employee-employer relation-

ship, both paying into and possessing a SIAC policy, the employee may not sue the employer for negligence. The contract with SIAC being the exclusive remedy of the employee. Plaintiff Bandy sought to circumvent the contract with SIAC and proceed against the Employer's Real Estate Agents notwithstanding the fact that the employee relationship was with the owner of the premises on which Bandy was employed.

In both the *Bandy* decision and the *Kowcum* decisions, there was actual SIAC coverage prior to the injury. In the case at bar there was no insurance policy with SIAC prior to the injury. This then gives rise to the statutory exception providing plaintiff with the right to accept a SIAC award and likewise maintain an action against the non-complying employer.

One of the protections of the Act to the employer is that the Act provides for the exclusive remedy to an injured workman; however, as a prerequisite to this protection, there must be full compliance by the employer. In the case at bar there was absent that compliance. Therefore Gates is not entitled to the protection granted by the Act in the *Bandy* and *Kowcum* decisions.

Gates only came within the purview of the Act, when, by its corporate maneuvering, Columbine was "absorbed" into Gates. Gates was then required to make a separate filing.

Gates by not filing under the Act, was then a non-complying employer engaged in a hazardous in-

dustry. This non-compliance then gives statutory sanction (ORS 656.314) to plaintiff accepting a SIAC award and at the same time proceed against the non-complying employer.

There was evidence that Columbine was not "absorbed" or "liquidated" into Gates on January 31, 1965 (Pl. Ex. 45, 46, 47, 48, 49).

Argument 3

The filing of an application for benefits under the Act in excess of the time limitation provided by statute (ORS 656.274, sub 1) clearly precludes the employer from invoking the protection of the Act.

The Act is designed as a protection for the employee and the employer, providing there is proper compliance with the Act. The Oregon Legislature has clearly set the time limitation under the statute. The Supreme Court of Oregon has recently interpreted and approved the statutory time limitation in *Johnson v. Oregon Compensation Department*, 425 P.2d 496 (April 1967); which this court should follow.

The District Court did not have the benefit of this latest decision of the Oregon Supreme Court at the time of its opinion in the case at bar.

The Supreme Court of Oregon applied the statutory interpretation of ORS 656.274, the same being applied in the case at bar, thus: on the question, "When must a claimant for Workmen's Compensation benefit file his claim with the Commission."

The question arose when the Commission denied the filing of a claim by a workman because the claim was not timely filed. The Circuit Court allowed the filing of the claim, although not timely filed. The Supreme Court reversed the trial court, and expressed itself as follows:

“A claimant may file his claim at any time within the first three months after the accident. For the next nine months he can successfully file his claim only if he can make a sufficient showing that his failure to previously file was excusable.”

“The Legislature has provided a relatively ‘tight’ limitation statute for compensation claims and requires early filing,—three months and an additional nine months upon a sufficient showing.”

Applying that clear cut rule of law to the case at bar pertaining to the limitation of time for the filing of a claim, the evidence clearly reveals that defendant filed the Feist claim in excess of three months after the injury (Def. Ex. 9).

There was no evidence that plaintiff made a showing necessary for the claim to be received after the three month limitation based on excusable inability to file the claim. Therefore the defendant did not make a proper filing.

The only legal conclusion, then, is that the award based on the filing was an award under ORS 656.314, which grants plaintiff the right to accept the award from SIAC and proceed against the employer.

It also follows as a conclusion of law that neither the Commission or Court may waive that limitation.

Defendants have produced no evidence that plaintiff filed the application. Plaintiff made no showing of tardiness.

The evidence clearly reveals that it was to the best interests of Gates that a claim be filed and an award made so as to prejudice plaintiff's rights. The evidence clearly reveals that defendant prepared, initiated and filed not only one claim (Def. Ex. 9) after the limitation but similar claims were filed by Gates officials subsequent to the later filing of the original (see SIAC file No. 2, Ex. 77, 18, 80). Plaintiff signed the original claim (Def. Ex. 9) thinking it was an insurance form on May 20th, 1965 (Tr. 40, 42).

Obviously the protection of the Oregon Workmen's Compensation Act is denied the defendant. The opinion of the District Court (R. 43, 60) clearly places plaintiff in the statutory position of exercising his rights against a non-complying employer in an industry made hazardous by the questionable absorption of Columbine by Gates.

SIAC possesses a statutory lien on funds which plaintiff will recover from Gates at a trial on the merits. These funds are not due SIAC until Plaintiff receives the award from Gates in accordance with the statute (ORS 656.314).

Defendants, by initiating, preparing and consummating the filing of the claim (Def. Ex. 9) actually

precipitated a situation which would not preclude or exclude plaintiff from his common law remedy.

SUMMATION OF ARGUMENT

An initial examination of the plaintiff's and defendant's legal positions might well lead experienced court and counsel to rely on the circumstances which might well indicate that Plaintiff is denied his common law remedy against his employer by reason of his accepting an award from SIAC. The District Court clearly recognized that Columbine was "liquidated" into Gates, despite the back dating of the purported ceasing of doing business in Oregon by Columbine filed April 21, 1965 (Pl. Ex. 18), and despite the fact that Columbine failed to comply with Oregon Corporation statutes (ORS 57.711; 57.595; 57.460) providing for the merger, consolidation of foreign corporations in Oregon and the requirements in Oregon. In any event, Columbine is still a recognized Colorado Corporation (Pl. Ex. 20A).

The opinion of the court clearly recognized that there were exceptions to a plaintiff being limited to his recovery under the Act; but failed to apply the statutory exception to the limitation, viz, against a non-complying employer.

Plaintiff sustained his injury on February 2, 1965, and on April 20th he entered a hospital for treatment and subsequent to the hospitalization he was under medication at home when Gates initiated and prepared a SIAC claim. Even on May 20th, 1965

this date was in excess of three months after the injury. Subsequently, evidence reveals that Gates filed similar claims. Likewise on May 20th, 1965 Gates officials in Denver prepared and filed their Employers Notice to Industrial Accident Commission to engage in a hazardous industry (SIAC File No. 3, Ex. 40). On May 21, 1965, Gates officials in Denver filed their rejection of the Oregon Workman's Compensation Act.

Gates after initiating and preparing the Feist claim procured the filing of the claim on May 24th, well in excess of the limitation of time for the filing of the application. The Court and the Commission is precluded from waiving the time limitation, in accordance with the rule in *Johnson v. Compensation Department*.

Gates as such, and while Feist was in their employ was engaged in a non-hazardous industry. Columbine, a separate corporation, was purportedly absorbed by Gates two days prior to the accident suffered by plaintiff. It was engaged in a hazardous industry. Gates sought to circumvent their liability to Feist by leaning on their absorption of Columbine, preparing and initiating an application for the Feist claim after the ninety day limitation. Feist accepted an award, at that time he was on welfare (Tr. 42).

Theoretically, the acceptance of an award from SIAC would exclude plaintiff from seeking a remedy against his employer. However the exclusion is premised on the legal compliance with the Act. Gates by engaging in a hazardous industry and not having

complied with the provisions of the statute is therefore within the exception referred to by the District Judge which grants plaintiff the right to accept the award from SIAC and at the same time maintain a right of action based on negligence against his employer.

The following decisions of the Supreme Court of Oregon are generally applicable herein:

“Waiver or estoppel cannot be the basis for creating a contract of coverage where no such contract previously existed,” see *Shaffer v. Mill Owners*, 407 P.2d 614 (Or. 1966); obviously there was no contract of coverage in the case at bar, between Gates and SIAC prior to Feist sustaining his injury.

That SIAC administers a trust fund and the state cannot be estopped by the unauthorized acts of its officers charged with the administration of the fund to pay compensation to a person not entitled thereto. See *Allen v. SIAC*, 200 Or. 521, 265 P.2d 1086. The only reasonable legal interpretation in the case at bar is that Plaintiff exercised his election to proceed against the employer in accordance with the statute (ORS 656.314) with SIAC retaining a lien on the recovery by plaintiff.

The Supreme Court of Oregon has recognized the existence and validity of the common law right of an injured workman to proceed against his employer and that right should not be taken away in the absence of a clear and concise expression compelling that conclusion. See *Newell v. Taylor*, 212 Or. 522, 321 P.2d 294.

The whole scheme of the Act is statutory and in acquiring jurisdiction in pursuit of a statutory remedy the requirements of the enactment must be complied with. See *Gerber v. SIAC*, 164 Or. 353, 101 P.2d 416.

And that SIAC is an insurer within the meaning of the term, is an expression of the Attorney General of Oregon, see 18 Op. Atty. Gen. 31 (1936-38). Obviously in the case at bar, Gates attempted to circumvent the Act by "absorbing Columbine, after the injury; then preparing and initiating the filing of a claim after the purported absorption of Columbine. This then places defendant Gates in the position of attempting to obtain an insurance policy after an injury has occurred; and procuring the filing of the policy after the limitation of time had expired.

Obviously an employer not operating under the Act is deprived of his common law defenses. See *Brady v. Oregon Lumber Company*, 117 Or. 188, 243 P.2d 96, and there was no evidence that Gates was operating under the act at the time of the injury.

A corporation is a legal entity separate and distinct from stockholders, directors and officers. See *Finn v. Mickle Lmbr. Co.*, 41 F.2d 676 (9th Cir.).

There was no privity between plaintiff and Columbine and hence Gates may not avail itself of its relationship between itself and a separate corporate entity to exclude plaintiff from his common law rights in accordance with statute. Gates and Columbine were separate legal entities.

CONCLUSION

The evidence is clear that Gates was a non-complying employer under the Oregon Workman's Compensation Act because of their failure to file their statutory notice with SIAC. The opinion of the District Court reveals that Gates presented evidence that Columbine was absorbed by Gates two days prior to the plaintiff sustaining his injury. Plaintiff was an employee of Gates, Columbine was a separate corporation. Gates by "absorbing Columbine, then was operating a hazardous industry as a non-complying employer.

Therefore defendant engaged in the operation of a hazardous industry cannot avail itself of the protection of the Act, and likewise is prohibited by statute from excluding plaintiff from his common law remedy even though plaintiff has accepted an award from SIAC.

Therefore the judgment rendered in the District Court on the segregated issue, should be reversed, or amended to include the statutory exception to which the court incorporated in the opinion or at least a new trial on the segregated issue.

Respectfully submitted

ADELBERT G. CLOSTERMANN
Attorney for Appellants

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

ADELBERT G. CLOSTERMANN
Attorney for Appellants